BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAY W. LOWREY	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,056,645
	)	
USD 259	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the August 18, 2011, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Garry L. Howard, of Wichita, Kansas, appeared for claimant. Vince Burnett, of Wichita, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) authorized Dr. Daniel Prohaska as claimant's treating physician and ordered all medical paid. The ALJ further ordered respondent to pay claimant temporary total disability compensation if claimant is taken off work.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 18, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that claimant is entitled to medical treatment for his condition. Respondent contends that claimant's workplace incident was not an accident under the provisions of L. 2011, ch. 55, sec. 5 [44-508(d)] and was not the prevailing factor for claimant's current complaints as defined in L. 2011, ch. 55, sec. 5 [44-508(g)]. Respondent contends claimant suffered from a preexisting degenerative condition in his left knee which is not compensable based on L. 2011, ch. 55, sec. 5 [44-508(f)(1)].

Claimant denies he had a preexisting condition in his left knee. He asserts the ALJ correctly found his fall off a ladder at work was the prevailing factor for his current problems with his left knee. Accordingly, claimant argues he sustained his burden of proving he had

a compensable injury pursuant to the Workers Compensation Act and the ALJ's Order should be affirmed.

The issues for the Board's review are:

(1) Did claimant sustain an accident at work based on the definition of "accident" as set out in L. 2011, ch. 55, sec. 5 [44-508(d)]?

(2) Did claimant sustain a personal injury based on the definition of "injury" as set out in L. 2011, ch. 55, sec. 5 [44-508(f)]?

(3) Was claimant's incident at work on May 18, 2011, the prevailing factor for his current problems?

FINDINGS OF FACT

Claimant has worked for respondent for 27 years as an air conditioning and heating technician. On May 18, 2011, he was working on the third rung of a ladder in the boiler room at Cleveland Elementary School when he missed the step going down and fell to the floor. He hit his left knee and then fell backwards onto his right shoulder and the back of his right arm. The next morning he filled out an accident report, setting out that he had bruised his right arm and had a swollen left knee. Respondent asked if claimant wanted to do anything about his injuries, but he said he wanted to wait until the bruising went away to see if he needed treatment.

Claimant testified that the bruising on his arm went away, but his knee never got better. He said when he squatted or twisted his left foot, he experienced a sharp pain in his kneecap. He contacted his supervisor, and respondent sent him to Dr. David Hufford on June 7, 2011. Dr. Hufford ordered an MRI on claimant's knee, and it revealed that claimant had a torn medial meniscus. The MRI also revealed:

> Mild subchondral stress reaction is present within the medial aspect of the medial tibial plateau deep to the medial meniscal tear . . . without stress fracture.
>
> High-grade . . . chondromalacia is present within the medial compartment, involving the weightbearing medial femoral condyle.
>
> High-grade . . . patellofemoral chondromalacia is present involving the superior aspect of the lateral patellar facet and to a lesser extent the medial patellar facet with mild underlying subchondral bone marrow reaction.[1]

After receiving the results of the MRI, Dr. Hufford referred claimant to Dr. Pat Do. However, respondent sent claimant instead to Dr. Daniel Prohaska. Dr. Prohaska recommended surgery to repair the meniscus tear. He also set out in his report:

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[1] P.H. Trans., Cl. Ex. 1 at 1.

> I explained to him that with a meniscus tear this can cause mechanical symptoms but he clearly has some degenerative changes in his knee. I explained to him that this is pre-existing and he may have some residual discomfort even after an arthroscopy.[2]

Before the scheduled surgery took place, however, claimant's workers compensation claim was denied by respondent. Claimant denies any problems with his left knee in the past. He has never been treated for knee problems or had pain in his left knee prior to the accident on May 18, 2011. He denied he had a history of arthritis. He has had joint stiffness, but no more than anyone his age, 56. Also, his work requires him to climb on roofs and crawl through tunnels. He normally takes Ibuprofen for joint stiffness but at times his family physician, Dr. Carol Johnson, will give him a prescription medication.

Claimant contacted Dr. Johnson's office on June 14, 2011, stating that his knee was stiff, sore and swollen after he fell off a ladder at work and asking if Dr. Johnson would write a prescription for pain pills. Dr. Johnson indicated she would write the prescription but cautioned that claimant "should not allow his regular medical insurance to pay for work comp meds."[3] On July 6, 2011, claimant contacted Dr. Johnson's office telling her that respondent was claiming his condition was not work related and asking her to write a letter stating that he had not had previous knee problems. Dr. Johnson responded:

> Well, I would need to go back through his chart very thoroughly. I would need to go through his past x-rays. With his obesity and his degenerative back pain, he probably did have some degeneration of his knee as well. I can do that later, but I do not know if it will help or not.[4]

Claimant has not had surgery on his left knee.

PRINCIPLES OF LAW

L. 2011, ch. 55, sec. 1 states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

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[2] P.H. Trans., Resp. Ex. 1 at 3.

[3] P.H. Trans., Resp. Ex. 2 at 4.

[4] P.H. Trans., Resp. Ex. 2 at 1.

L. 2011, ch. 55, sec. 5 states in part:

(d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.

. . . .

(f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an

> issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS AND CONCLUSION

Before preliminary benefits can be awarded, claimant must prove he suffered injury by an accident that arose out of and in the course of his employment with respondent. Respondent denies claimant met with accident, denies claimant's injury was caused by his alleged accident, and denies the alleged accident is the prevailing factor of claimant's knee condition and need for treatment. The ALJ made no explicit findings of fact or conclusions of law. The ALJ's Order does not address the issues raised by respondent in this appeal. Nevertheless, because the ALJ awarded claimant compensation, it is inferred that the ALJ resolved these issues in claimant's favor.

On May 18, 2011, claimant was at work performing his regular job duties when he fell from a ladder, landing first on his left leg and then falling to the floor on his right arm and shoulder. Claimant testified:

> I was working on a six-foot ladder, standing on the third rung, working on what we call a pneumatic dryer, it dries the air for temperature control. I put the cover back on it and as I was coming down the ladder, I stepped first with my right foot, and then with my left foot. Somehow I missed the step, but I had too much momentum going backwards, and I fell to the floor, approximately two rungs on the ladder, and I hit my left knee–or hit my left leg straight, with no flex in the knee, and then I fell backwards on the cement floor on my right shoulder and the back of my right arm.[7]

The following day, claimant reported the accident to his supervisor and completed an accident report. He reported a bruised right arm and a swollen left knee. Perhaps, as respondent contends, to connect the subsequent bruise on the arm and the swelling in the knee to the fall the day before is to employ the logic of post hoc, ergo propter hoc, which

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[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2010 Supp. 44-555c(k).

[7] P.H. Trans. at 7-8.

was recently rejected by the Kansas Court of Appeals in *Chriestenson*.[8] Nonetheless, legal maxims should not be employed to deny common sense.[9] Medical evidence is not necessary to prove an accident or to prove that the accident caused an injury. Claimant testified that he had no pain and no swelling in his knee before his fall from the ladder, but after falling from the ladder and jamming or hyper extending his knee, he then had pain and swelling. Common sense leads to the conclusion that the accident caused a knee injury. That said, it must be recognized that the recent amendments to the Workers Compensation Act include a requirement which an injured claimant must satisfy before becoming eligible for medical treatment. That test is whether the work-related accident was the prevailing factor in causing the injury.

Claimant denies having symptoms in his left knee before May 18, 2011. There is no contrary evidence. There is, however, evidence that at least some of the findings revealed by the MRI likely preexisted the fall on May 18, 2011. The expert medical opinion relied upon by respondent is that of Dr. Prohaska. Dr. Prohaska was not deposed but portions of his chart are a part of the record of the preliminary hearing. His chart contains the following entry for June 23, 2011:

> I explained to him that with a meniscus tear this can cause mechanical symptoms but he clearly has some degenerative changes in his knee. I explained to him that this is pre-existing and he may have some residual discomfort even after an arthroscopy. However, with his symptoms at this point I do believe it is reasonable to consider a diagnostic arthroscopy and have indicated him for this with medial meniscectomy. He would like to proceed in this direction. . . .[10]

From this record, it is not entirely clear whether Dr. Prohaska is attributing all or only some of claimant's knee problems to preexisting and degenerative conditions, but it appears he is describing the degenerative changes as separate from the meniscus tear. Further, it appears that he attributes claimant's symptoms to the meniscus tear. The surgery Dr. Prohaska is recommending, however, is described by the doctor as "diagnostic." This could mean that Dr. Prohaska is not sure what is causing claimant's symptoms and, therefore, arthroscopic surgery should be performed in order to make a more informed diagnosis. The position of this claim at the time of the preliminary hearing was that the authorized treating physician, Dr. Prohaska, an orthopedic surgeon selected by respondent, was recommending an arthroscopy to claimant's left knee for diagnostic

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[8] *Chriestenson v. Russell Stover Candies*, __ Kan. App. 2d __, __ P.3d __, *rev. pending* (2011) [No. 104,412 filed September 9, 2011].

[9] The very essence of the scientific method acknowledges the principle of post hoc, ergo propter hoc in that when an experiment can be repeated under controlled conditions and a like result is obtained, the cause and effect relationship is considered to have been verified and proven. It is by such methods that a hypothesis is validated, that is, by observation or experiment.

[10] P.H. Trans., Resp. Ex. 1 at 3.

purposes as well as for treatment of the meniscus tear. To the extent the procedure is diagnostic, it is difficult to ascertain the prevailing factor without knowing the diagnosis. In other words, doing the procedure and having the diagnosis will be important evidence for determining what is causing claimant's symptoms. To some extent, therefore, the question of prevailing factor is premature. Nevertheless, to the extent the arthroscopic procedure is treatment, claimant bears the burden of proving that the treatment is to cure and relieve the effects of a work-related injury. There is no clear medical expert opinion relating the meniscus tear or the surgery to the May 18, 2011, accident.

This Board Member is persuaded that claimant has met his burden of proving he sustained an accident and injury as those terms are defined by the Workers Compensation Act. But whether the accident was the prevailing factor in causing the knee injury is another issue. On this issue, the record contains certain medical evidence of a preexisting degenerative condition. The significance of that preexisting condition is not adequately explained. Claimant has failed to meet his burden of proving the work-related accident is the prevailing factor in causing claimant's injury and current need for treatment.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated August 18, 2011, is reversed.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Garry L. Howard, Attorney for Claimant
Vince Burnett, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge